

# **USA PATRIOT Act Reauthorization Proposals and Related Matters in Brief**

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Both Houses have approved proposals to reauthorize USA PATRIOT Act sections scheduled to expire at the end of the year. The House passed H.R. 3199, the USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005 on July 21, 2005, 151 Cong. Rec. H6307. The Senate passed the Judiciary Committee reported S. 1389, the USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005, without amendment, on July 29, 2005, 151 Cong. Rec. S9559-562. S. 1389 makes permanent all of the expiring USA PATRIOT Act provisions except for sections 206 (roving FISA wiretaps) and 215 (FISA tangible item orders) whose expiration along with that of the lone wolf amendment it postpones until December 31, 2009. H.R. 3199 takes much the same approach but postpones expiration of sections 206 and 215 until December 31, 2015, makes the lone wolf amendment and the “material support” amendments permanent. Each of the bills amends section 215, the so-called FISA library or business record section, as well as some of the sections they make permanent. Each addresses concerns relating to the use of national security letters. H.R. 3199 alone deals with a wide array of proposals ranging from first responder grants through port security and terrorist penalty enhancements to confiscation expansions. Related CRS Reports include CRS Report RL33027, *USA PATRIOT Act: Background and Comparison of House- and Senate-Approved Reauthorization and Related Legislative Action*; CRS Report RL32186, *USA PATRIOT Act Sunset: Provisions That Were to Expire on December 31, 2005*; CRS Report RS21441, *Libraries and the USA PATRIOT Act*; CRS Report RL32907, *Security and Freedom Ensured Act (SAFE Act)(H.R. 1526) and Security and Freedom Enhancement Act (SAFE Act)(S. 737): Section By Section Analysis*; CRS Report RL30465, *Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework and Recent Judicial Decisions*; and CRS Report RL32880, *Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations: Background and Proposed Adjustments*.

The theme common to each of the USA PATRIOT Act proposals to see legislative action in this Congress — House passed H.R. 3199 and Senate passed S. 1389 — is the proper balance between security and civil liberties in the context of two statutes governing information collection, the Electronic Communications Privacy Act (ECPA)(18 U.S.C. 2510-2522, 2701-2712, 3121-3127) and the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801-1862. ECPA has three sets of general prohibitions accompanied by law enforcement exceptions that operate under judicial supervision. They involve: (1) the interception of wire, oral or electronic communications (wiretapping), 18 U.S.C. 2510-2522; (2) access to the content of stored electronic communications and to communications transaction records, 18 U.S.C. 2701-2712; and (3) the use of trap and trace devices and pen registers (essentially in and out secret caller id devices), 18 U.S.C. 3121-3127. FISA is concerned with gathering information about foreign powers and their agents including international terrorists; it has four parts devoted to: (1) electronic surveillance (wiretapping), 50 U.S.C. 1801-1811; (2) physical searches, 1821-1829; (3) pen registers and trap and trace devices (pen registers), 50 U.S.C. 1841-1846; and (4) production of tangible items (access to business records), 50 U.S.C. 1861-1862.

The USA PATRIOT Act sections scheduled to expire are:

- Sec. 201* (ECPA wiretapping in certain terrorism investigations)
- Sec. 202* (ECPA wiretapping in computer fraud and abuse investigations)
- Sec. 203(b)* (law enforcement sharing of court-ordered wiretap-generated foreign intelligence information wiretap information)
- Sec. 203(d)* (law enforcement sharing of foreign intelligence information notwithstanding any other legal restriction)
- Sec. 204* sharing foreign intelligence information (technical exception for foreign intelligence pen register/trap & trace device use)
- Sec. 206* (assistance in conducting roving FISA wiretaps)
- Sec. 207* (duration of FISA wiretap and search orders involving agents of a foreign power)
- Sec. 209* (seizure of stored voice mail by warrant rather than ECPA order)
- Sec. 212* (communications providers emergency disclosures of communications content or related records to authorities)
- Sec. 214* (FISA pen register order amendments including extension to electronic communications, e.g., Internet use)
- Sec. 215* (FISA tangible items access orders)
- Sec. 217* (law enforcement access to computer trespassers' communications within the intruded system)
- Sec. 218* (FISA wiretap or search orders with an accompanying law enforcement purpose (removal of the wall of separation between criminal catchers and spy catchers))
- Sec. 220* (nation-wide service of court orders directed to communication providers)
- Sec. 223* (civil liability and disciplinary action for certain ECPA or FISA violations)
- Sec. 225* (civil immunity for assistance in executing a FISA order).

The Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, has two sunset provisions. Section 6001 of the act which sunsets on December 31, 2005 defines agents of a foreign power, 50 U.S.C. 1801(b)(1)(C), so as to permit FISA orders targeting so-called “lone wolf” terrorists without requiring any showing that they are members of a terrorist group or agents of such a group or of any other foreign power. Section 6603 expands and clarifies the laws that proscribe material assistance to foreign terrorists or foreign terrorist organizations, 18 U.S.C. 2339A, 2339B; it expires on December 31, 2006.

Several statutes permit intelligence authorities to issue national security letters (NSLs) requesting information relating to national security investigations from the business records of third party

communications providers, 18 U.S.C. 2709; financial institutions, 12 U.S.C. 3414; consumer credit bureaus, 15 U.S.C. 1681u, 1681v; and the like, 50 U.S.C. 436. A lower federal court decision now on appeal held that the practices associated with the exercise of NSL authority under 18 U.S.C. 2709 violated the Fourth and First Amendments because of a want of judicial supervision and the facially permanent, all consuming nature of the gag orders that come with an NSL, *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004). Federal law enforcement officials enjoy authority to issue administrative subpoenas in a limited number of cases under statutes that generally include provisions for judicial supervision and in some instances more narrowly confined gag orders, see e.g., 21 U.S.C. 886, 18 U.S.C. 3486. Federal law enforcement and national security officials may also request postal authorities to maintain mail covers under which they record the information contained on the outside of the letters or other mail sent or received by the particular targets of an investigation, 39 C.F.R. §233.3.

H.R. 3199, the USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005, as passed by the House, would:

- make permanent all the temporary USA PATRIOT Act sections (except sections 206 and 215) and the temporary FISA lone wolf section, due to expire on December 31, 2005, and the material assistance amendments which expire a year later, and postpone until December 31, 2015 (rather than permanently) the expiration of sections 206 (roving FISA wiretaps) and 215 (FISA tangible items);
- require law enforcement officials to report their sharing of wiretap-unearthed national security information to the issuing court;
- permit the use of long tenured FISA wiretap and search orders targeting alien agents of a foreign power (not just members of international terrorist groups and officials or employees of foreign powers);
- recast the business record/tangible item provisions of section 215 to (1) make explicit its relevancy standard and court authority to grant or modify conforming applications, (2) permit recipient disclosure to his attorney, and (3) provide a mechanism for judicial challenges within the FISA court;
- require additional notice and identifying information to the issuing FISA court when the execution of a FISA surveillance order results in roving;
- increase the law enforcement wiretap predicate offense list by over 20 crimes;
- add various terrorist offenses to the civil forfeiture list and definition of federal crimes of terrorism;
- provide for judicial review and enforcement of national security letters and their attendant confidentiality provisions;
- establish a revised grant program for first responders;
- set a 180 day cap on sneak and peek notification delays (with 90 caps on extensions);
- expand the criminal prohibitions relating to attacks on mass transit;
- require Justice Department Inspector General review of material witness authority use;
- make the death penalty more widely available for terrorist offenses;
- in order to promote greater seaport security, create new federal crimes, expanding prohibitions and increase the penalties associated with maritime offenses; and

- enhance the government's authority to confiscate crime-related property, particularly in terrorism cases.

Senator Specter introduced the USA PATRIOT Act Improvement and Reauthorization Act of 2005, S. 1389, which as reported by the Judiciary Committee and subsequently passed by the Senate would:

- postpone until December 31, 2009, the lone wolf FISA definition and sections 215 (FISA tangible item orders) and 206 (FISA roving wiretaps) of the USA PATRIOT ACT;
- make permanent all of the other temporary USA PATRIOT Act sections and the temporary material assistance section of the 2004 intelligence reform legislation;
- require in the case of FISA roving wiretaps that either identity of the target or the nature and location of the targeted facilities be specified, that if the nature and location are not known surveillance be limited to times when the target is present, that new notice and identifying information be supplied to the issuing court when the execution of a FISA surveillance becomes roving, and reports to Congress be expanded;
- extend the tenure of FISA wiretap, search and pen register/trap and trace orders when the foreign agent target is not a U.S. person;
- increase the reporting requirements relating to emergency communications service provider disclosures, the use of delayed notice warrants, FISA pen register orders, FISA tangible item orders;
- limit the delayed notice of the execution of a sneak and peek warrant to seven days (later if the facts justify) with the possibility of 90 day good cause extensions, and eliminate trial delay as an adverse circumstance justifying delayed notice;
- permit the FISA court to issue pen register/trap and trace orders that instruct assisting service providers to supply related customer transaction information;
- recast the section 215 tangible order provisions to (1) require a FISA court finding of the facts in the application establish reasonable ground to belief that items sought pertain to foreign power or agent of foreign power, are relevant to the activities of a suspected agent of a foreign power, or pertain to an individual in contact with or known to a suspected agent of a foreign power; (2) permit recipient disclosure to attorneys and court challenges; (3) require a particularized description of the tangible items sought; (4) authorize judicial review and setting aside an order requiring the production of items that would be beyond the reach of a grand jury; and (5) authorize use to acquire library, book store, firearm or medical records only on FBI Director approval; and
- adjust the national security letter provisions of 18 U.S.C. 2709 to permit recipient disclosures to their attorneys and court challenges based on right or privilege, and to authorize judicial enforcement against recalcitrant recipients.

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